

**TITLE 114
LEGISLATIVE RULE
OFFICES OF THE INSURANCE COMMISSIONER**

**SERIES 11B
SUITABILITY IN ANNUITY TRANSACTIONS**

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**SERIES 11B
SUITABILITY IN ANNUITY TRANSACTIONS**

§114-11B-1. General.

1.1. The purpose of this rule is to require insurers to establish a system to supervise recommendations and to set forth standards and procedures for recommendations to consumers that result in ~~a transaction~~ transactions involving annuity products so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed. This rule is based on the National Association of Insurance Commissioners' "Suitability in Annuity Transactions Model Regulation" (Model 275), as amended in ~~2006~~ the 1st quarter of 2010.

1.2. Nothing in this rule creates or implies a private cause of action for a violation of this rule.

1.3. Authority. -- W. Va. Code §§33-2-10 and 33-11-6.

1.4. Filing Date. -- ~~May 5, 2008~~.

1.5. Effective Date. -- ~~August 1, 2008~~.

§114-11B-2. Scope.

This rule applies to any recommendation to purchase ~~or~~, exchange or replace an annuity made to a consumer by an insurance producer, or an insurer where no producer is involved, that results in the purchase ~~or~~, exchange or replacement recommended.

§114-11B-3. Exemptions.

Unless otherwise specifically included, this rule does not apply to ~~recommendations~~ transactions involving:

3.1. Direct response solicitations where there is no recommendation based on information collected from the consumer pursuant to this rule;

3.2. Contracts used to fund:

3.2.a. An employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA), 29 U.S.C. Section 1001, et seq. as amended;

3.2.b. A plan described by Sections 401(a), 401(k), 403(b), 408(k) or 408(p) of the Internal Revenue Code (IRC), as amended, if established or maintained by an employer;

3.2.c. A government or church plan defined in Section 414 of the IRC, a government or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax exempt organization under Section 457 of the IRC;

3.2.d. A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor;

3.2.e. Settlements or assumptions of liabilities associated with personal injury litigation or any dispute or claim resolution process; or

3.2.f. Formal prepaid funeral contracts.

§114-11B-4. Definitions.

4.1. "Annuity" includes a fixed annuity or variable annuity that is individually solicited, whether the product is classified as an individual or group annuity.

4.2. "Continuing education credit" or "CE credit" means one continuing education credit from a course of instruction on a Commissioner-approved subject, taught by a continuing education provider registered with and approved by the Commissioner in accordance with W.Va. Code §33-12-8 and W.Va. Code of State Rules §§114-42-1 et. seq..

4.3. "Continuing education provider" or "CE provider" means an individual or entity that is approved to offer continuing education courses pursuant to W.Va. Code §§33-12-8 and W.Va. Code of State Rules §114-42-1 et. seq.

4.4. "FINRA" means the Financial Industry Regulatory Authority or a succeeding agency.

4.25. "Insurer" means a company required to be licensed under the laws of this state to provide insurance products, including annuities.

4.36. "Insurance producer" means a person required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities.

4.47. "Recommendation" means advice provided by an insurance producer, or an insurer where no producer is involved, to an individual consumer that results in a purchase or exchange of an annuity in accordance with that advice.

4.8. "Replacement" means a transaction in which a new policy or contract is to be purchased, and it is known or should be known to the proposing producer, or to the proposing insurer if there is no producer, that by reason of the transaction, an existing policy or contract has

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been or is to be:

4.8.a. Lapsed, forfeited, surrendered or partially surrendered, assigned to the replacing insurer or otherwise terminated;

4.8.b. Converted to reduced paid-up insurance, continued as extended term insurance, or otherwise reduced in value by the use of nonforfeiture benefits or other policy values;

4.8.c. Amended so as to effect either a reduction in benefits or in the term for which coverage would otherwise remain in force or for which benefits would be paid;

4.8.d. Reissued with any reduction in cash value; or

4.9.e. Used in a financed purchase.

4.9. “Suitability information” means information that is reasonably appropriate to determine the suitability of a recommendation, including the following:

4.9.a. Age;

4.9.b. Annual income;

4.9.c. Financial situation and needs, including the financial resources used for the funding of the annuity;

4.9.d. Financial experience;

4.9.e. Financial objectives;

4.9.f. Intended use of the annuity;

4.9.g. Financial time horizon;

4.9.h. Existing assets, including investment and life insurance holdings;

4.9.i. Liquidity needs;

4.9.j. Liquid net worth;

4.9.k. Risk tolerance; and

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4.9.l. Tax status.

§114-11B-5. Duties of Insurers and Insurance Producers.

5.1. In recommending to a consumer the purchase of an annuity or the exchange of an annuity that results in another insurance transaction or series of insurance transactions, the insurance producer, or the insurer where no producer is involved, must have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to his or her investments and other insurance products and his or her financial situation and needs, including the consumer's suitability information, and that there is a reasonable basis to believe all of the following:

5.1.a. The consumer has been reasonably informed of various features of the annuity, such as the potential surrender period and surrender charge, potential tax penalty if the consumer sells, exchanges, surrenders or annuitizes the annuity, mortality and expense fees, investment advisory fees, potential charges for and features of riders, limitations on interest returns, insurance and investment components and market risk. The requirements of this section are intended to supplement and not replace the disclosure requirements found in W.Va. Code of State Rules §§114-11E-1 et. seq.;

5.1.b.. The consumer would benefit from certain features of the annuity, such as tax-deferred growth, annuitization or death or living benefits;

5.1.c. The particular annuity as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or exchange of the annuity, and riders and similar product enhancements, if any are suitable (and in the case of an exchange or replacement, the transaction as a whole is suitable) for the particular consumer based on his or her suitability information; and

5.1.d. In the case of an exchange or replacement of an annuity, the exchange or replacement is suitable including taking into consideration whether:

5.1.d.1. The consumer will incur a surrender charge, be subject to the commencement of a new surrender period, lose existing benefits (such as death, living or other contractual benefits), or be subject to increased fees, investment advisory fees or charges for riders and similar product enhancements;

5.1.d.2. The consumer would benefit from product enhancements and improvements; and

5.1.d.3. The consumer has had another annuity exchange or replacement

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and in particular, an exchange or replacement within the preceding 36 months.

5.2. Prior to the execution of a purchase ~~or~~, exchange or replacement of an annuity resulting from a recommendation, an insurance producer, or an insurer where no producer is involved, shall make reasonable efforts to obtain the consumer's suitability information concerning:

- a. ~~The consumer's financial status;~~
- b. ~~The consumer's tax status;~~
- c. ~~The consumer's investment objectives; and~~
- d. ~~Other information used or considered to be reasonable by the insurance producer, or the insurer where no producer is involved, in making recommendations to the consumer.~~

5.3. Except as permitted under subsection 5.4 of this rule, an insurer shall not issue an annuity recommended to a consumer unless there is a reasonable basis to believe the annuity is suitable based on the consumer's suitability information.

~~5.3:5.4.~~ a. Except as provided under subdivision b of this subsection, neither an insurance producer, nor an insurer where no producer is involved, has any obligation to a consumer under ~~subsection~~ subsections 5.1 or 5.3 of this section if ~~the consumer:~~

5.4.a.1. No recommendation is made;

5.4.a.2. A recommendation was made and was later found to have been prepared based on inaccurate material information provided by the consumer;

5.4.a.3. A consumer Refuses refuses to provide relevant suitability information requested by the insurer or insurance producer and the annuity transaction is not recommended; or

~~2. Decides to enter into an insurance transaction that is not based on a recommendation of the insurer or insurance producer; or~~

~~3. Fails to provide complete or accurate information.~~

5.4.a.4. A consumer decides to enter into an annuity transaction that is not based on a recommendation of the insurer or the insurance producer.

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5.4.b. An insurer ~~insurer's or insurance producer's recommendation~~ issuance of an annuity subject to subdivision a of this subsection shall be reasonable under all the circumstances actually known to the insurer ~~or insurance producer~~ at the time ~~of the recommendation~~ the annuity is issued.

5.5. An insurance producer or, where no insurance producer is involved, the responsible insurer representative shall at the time of sale:

5.5.a. Make a record of any recommendation subject to subsection 5.1 of this rule;

5.5.b. Obtain a customer signed statement documenting a customer's refusal to provide suitability information, if any; and

5.5.c. Obtain a customer signed statement acknowledging that an annuity transaction is not recommended if a customer decides to enter into an annuity transaction that is not based on the insurance producer's or insurer's recommendation.

~~5.46.~~ a. An insurer shall ~~either assure that~~ establish a supervision system to supervise recommendations that is reasonably designed to achieve the insurer's and its insurance producers' compliance with this rule is established and maintained by complying with subdivisions c, d and e of this subsection, or establish and maintain a system, including at a minimum, but not limited to, the following:

- ~~1. Maintaining written procedures; and~~
- ~~2. Conducting periodic reviews of its records that are reasonably designed to assist in detecting and preventing violations of this rule.~~

5.6.a.1. The insurer shall maintain reasonable procedures to inform its insurance producers of the requirements of this rule and shall incorporate the requirements of this regulation into relevant insurance producer training manuals;

5.6.a.2. The insurer shall establish standards for insurance producer product training and shall maintain reasonable procedures to require its insurance producers to comply with the requirements of section 6 of this rule;

5.6.a.3. The insurer shall provide product-specific training and training materials which explain all material features of its annuity products to its insurance producers;

5.6.a.4. The insurer shall maintain procedures for review of each

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recommendation prior to issuance of an annuity that are designed to ensure that there is a reasonable basis to determine that a recommendation is suitable. Such review procedures may apply a screening system for the purpose of identifying selected transactions for additional review and may be accomplished electronically or through other means including, but not limited to, physical review. Such an electronic or other system may be designed to require additional review only of those transactions identified for additional review by the selection criteria;

5.6.a.5. The insurer shall maintain reasonable procedures to detect recommendations that are not suitable. This may include, but its not limited to, confirmation of consumer suitability information, systematic customer surveys, interviews, confirmation letters and programs of internal monitoring. Nothing is this paragraph prevents an insurer from complying with this paragraph by applying sampling procedures, or by confirming suitability information after issuance or delivery of the annuity; and

5.6.a.6. The insurer shall annually provide a report to senior management, including to the senior manager responsible for audit functions, which details a review, with appropriate testing, resonably designed to determine the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any.

~~b. An insurance agency shall either adopt a system established by an insurer to supervise recommendations of its insurance producers that is reasonably designed to achieve compliance with this rule, or establish and maintain such a system, including, but not limited to:~~

- ~~1. Maintaining written procedures; and~~
- ~~2. Conducting periodic reviews of records that are reasonably designed to assist in detecting and preventing violations of this rule.~~

5.6.e b.1. Nothing in this subsection restricts An an insurer may contract with a third party to establish and maintain the system of supervision required by subdivision a of this subsection with respect to insurance producers under contract to or employed by the third party from contracting for performance of a function (including maintenance of procedures) required under subdivision a of this subsection. An insurer is responsible for taking appropriate corrective action and may be subject to sanctions and penalties pursuant to section 7 of this rule regardless of whether the insurer contracts for performance of a function and regardless of the insurer's compliance with paragraph 2 of this subdivision.

5.6.b.2. An insurer's supervision system under subdivision a of this subsection shall include supervision of contractual performance under this subsection. This includes, but is not limited to, the following:

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5.6.b.2.A. Monitoring and, as appropriate, conducting audits to assure that the contracted function is properly performed; and

5.6.b.2.B. Annually obtaining a certification from a senior manager who has responsibility for the contracted function that the manager has a reasonable basis to represent, and does represent, that the function is properly performed.

~~d. An insurer shall make reasonable inquiry to assure that the third party with whom it contracts under subdivision c of this subsection is performing the supervision functions required by subdivision a of this subsection and take reasonable action under the circumstances to enforce the contractual obligation. An insurer may comply with its obligation to make reasonable inquiry by:~~

~~1. Annually obtaining certification from a senior officer of the third party representing that the third party is performing the required functions; and~~

~~2. Periodically selecting, based on reasonable selection criteria, third parties contracting under subdivision c of this subsection for a review to determine whether the third parties are performing the required functions. The insurer shall perform those procedures to conduct the review that are reasonable under the circumstances.~~

~~e. An insurer that contracts with a third party pursuant to subdivision c of this subsection and that complies with the requirements to supervise in subdivision d of this subsection has fulfilled its responsibilities under subdivision a of this subsection.~~

~~5.6.fc. An insurer or insurance agency is not required to by subdivision a or b of this subsection to:~~

~~1. Review, or provide for review of, all insurance producer solicited transactions; or~~

~~2. Include include in its system of supervision an insurance producer's recommendations of products other than the annuities offered by the insurer or insurance agency.~~

~~g. An insurance agency contracting with an insurer pursuant to subdivision c of this subsection shall, upon request of the insurer, promptly give the insurer certification described in subdivision d of this subsection or a clear statement of why it is unable to meet the certification criteria.~~

~~h. No person may provide a certification under paragraph 1, subdivision d of this subsection unless:~~

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1. ~~The person is a senior officer with responsibility for the delegated functions; and~~

2. ~~The person has a reasonable basis for making the certification.~~

5.7. An insurance producer shall not dissuade, or attempt to dissuade, a consumer from:

5.7.a. Truthfully responding to an insurer's request for confirmation of suitability information;

5.7.b. Filing a complaint; or

5.7.c. Cooperating with the investigation of a complaint.

5.58. a. Sales made in ~~Compliance~~ compliance with the National Association of Securities Dealers Conduct Rules ~~FINRA requirements~~ pertaining to suitability and the supervision of annuity transactions satisfies the requirements of this ~~section for recommendations of variable annuities~~ regulation. This subsection applies to FINRA broker-dealer sales of variable annuities and fixed annuities if the suitability and supervision is similar to those applied to variable annuity sales. However, nothing in this subsection limits the Insurance Commissioner's ability to enforce (including investigations) the provisions of this rule.

5.8.b. For subdivision a of this subsection to apply, an insurer shall:

5.8.b.1. Monitor the FINRA member broker-dealer using information collected in the normal course of an insurer's business; and

5.8.b.2. Provide the FINRA member broker-dealer information and reports that are reasonably appropriate to assist the FINRA member broker-dealer to maintain its supervision system.

§114-11B-6. Insurance Producer Training.

6.1. No individual may sell, solicit or negotiate annuities unless he or she is licensed as a producer for life insurance and has completed a one-time training course that meets the requirements of subsection 6.2 of this section: *Provided*, That a producer selling, soliciting or negotiating annuities on July 1, 2011 is permitted to continue such activities and must complete the one-time training course prior to December 31, 2011.

6.2. The training required under this subsection shall be equivalent to least four (4) continuing education credits and shall include information on the types of annuities and various

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classifications of annuities; identification of the parties to an annuity; how fixed, variable and indexed annuity contract provisions affect consumers; the application of income taxation of qualified and non-qualified annuities; the primary uses of annuities; and appropriate sales practices, replacement and disclosure requirements: *Provided, That the training required by this section may not include training that is insurer or company product-specific or that includes any sales or marketing information, materials or training, other than those required by state or federal law.*

6.3. The training required by this section may be approved for continuing education credit by the Board of Insurance Agent Education in the manner as set forth in W. Va. Code §33-12-8.

6.4 . The satisfaction of the training requirements of another state that are substantially similar to the provisions of this subsection shall be deemed to satisfy the training requirements of this subsection.

6.5. An insurer subject to this rule shall verify that each producer appointed to sell its annuity products is compliant with this section before the producer is permitted to sell such products, shall maintain records supporting the verification as long as appointed by the company and for five years thereafter, and shall make the records available to the commissioner upon request.

§114-11B-67. ~~Mitigation of Responsibility~~ Compliance; Penalties.

7.1. An insurer is responsible for compliance with this rule. If a violation occurs, either because of the action or inaction of the insurer or its insurance producer, the Commissioner may order:

67.1.a. ~~The Insurance Commissioner may order an~~ An insurer, insurance producer, and insurance agency producer ~~that employs or contracts with an insurance producer to sell, or solicit the sale, of annuities to consumers~~ to take reasonably appropriate corrective action for any consumer harmed by the insurer's, or by its insurance producer's, violation of this rule;

7.1.b. Appropriate penalties and sanctions.

67.2. The Insurance Commissioner may reduce or eliminate any penalty under W. Va. Code §33-12-24 for a violation of subsection 5.1, subsection 5.2, or subdivision b of subsection 5.3 of this rule if corrective action for the consumer is taken promptly after a violation is discovered or the violation was not part of a pattern or practice.

§114-11B-78. Recordkeeping.

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78.1. Insurers, insurance agencies and insurance producers shall maintain or be able to make available to the Insurance Commissioner records of the information collected from the consumer and other information used in making the recommendations that were the basis for insurance transactions for ten (10) years after the transaction was completed.

78.2. An insurer is permitted, but is not required, to maintain documentation on behalf of an insurance producer.

78.3. Records required to be maintained by this rule may be maintained in paper, photographic, microprocess, magnetic, mechanical or electronic media or by any process that accurately reproduces the actual document.